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Mayor

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Zoning and Planning Action Date:	April 15, 2005
Board of Aldermen Action Date:	May 2, 2005
90-Day Expiration Date:	May 15, 2005

TO: Board of Aldermen
Planning and Development Board

FROM: Michael Kruse, Director of Planning and Development
Juris Alksnitis, Chief Zoning Code Official

SUBJECT: Petition # 238-01 of ALD. MANSFIELD & SAMUELSON proposing to amend Section **30-1**, to clarify the definition of “drive-in food service establishment”; to modify **Section 30-11(d)(10)** which allows by Special Permit an accessory drive-in to a food-related use in all business districts; and, to eliminate **Section 30-11(g)(5)** which allows “drive-in food service establishments” in Business 2 Districts by Special Permit.

CC: Mayor David B. Cohen
Philip B. Herr, Chair, Comprehensive Planning Advisory Committee

RECOMMENDATIONS:

- *Retain current definition of “drive-in food establishment”; consider refining “fast food” definition by adding selected criteria.*
- *Consider removing “drive-in” operations accessory option currently available to retail food establishments.*
- *Deny elimination of “drive-in food establishments” from BU-2 zone.*

The purpose of this memorandum is to provide the Board of Aldermen, Planning and Development Board, and the public with technical information and planning analysis which may be useful in the decision making process of the Boards. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Zoning and Planning Committee of the Board of Aldermen will consider its discussion at a subsequent Working Session.

I. BACKGROUND

This petition was last discussed by the Zoning and Planning Committee at its meeting of March 29, 2004, at which time the item was held. Subsequently, the item was scheduled for public hearing February 15, 2005.

While the enclosed memorandum prepared by the Planning Department provides an initial review and analysis of the petition, further study may be needed with regard to certain aspects of the petition.

II. EXISTING ORDINANCE AND PROPOSED AMENDMENTS

The changes contemplated pursuant to this petition affect **Sections 30-1, 30-11(d)(10), and 30-11(g)(5)**, as they relate to “fast food establishments” and “drive-in food service establishments”.

Current text, Section 30-1

The Zoning Ordinance currently uses the following definitions:

Restaurant

An establishment where the principal activity is the service or sale of food or drink for on-premises consumption.

Fast food establishment

An establishment whose primary business is the sale of food for consumption on or off the premises which is:

- (a) primarily intended for immediate consumption rather than for the use as an ingredient or component of meals*
- (b) available upon a short waiting time; and*
- (c) packaged and or presented in such a manner that it can be readily eaten outside the premises where it is sold.*

Drive-in food service establishment

A fast food establishment which provides convenient vehicular access and may provide service to customers while in their vehicles.

The petition seeks to clarify the definition of “drive-in food service establishment.”

Current text, Section 30-11(d)(10)

In Business 1-4 districts, the Board of Aldermen may grant a special permit for:

Drive-in or open-air business and appurtenant buildings or structures, or a drive-in business as part of any building or land used for the purposes authorized by section 30-11(a).

The petition is worded to allow modification of one or more components of this section, including further regulation or elimination of principal “drive-in” type businesses and/or accessory “drive-in” operations as located in Business 1-4 districts.

Current text, Section 30-11(g)(5)

In the Business 2 district, the Board of Aldermen may grant a special permit for:

Fast food establishment, drive-in food establishment.

The petition seeks to eliminate “fast food” and “drive-in food establishment” from BU-2 zone.

III. EXISTING DEFINITIONS

A. General.

It appears that the existing use definitions for “restaurants”, “fast food establishments”, and “drive-in food service establishments” were introduced into the Revised Zoning Ordinance (Zoning Ordinance) in October 1974. These changes seem to have been prompted by an application for a victualler’s license for a McDonald’s establishment to be located in 330-334 Walnut Street in Newtonville and concern over related parking and traffic issues. In September 1974, Petition #596-74 was filed by then Alderman Richmond to amend the Revised Zoning Ordinance by creating the definitions and use regulations outlined above.

As a result, since 1974 the City of Newton has in effect sought to distinguish between so-called fast food establishments, i.e. food best known in association with and served by national chains such as McDonalds, Burger King, etc., and food perceived as having more of a retail character. City officials in 1974 could not have anticipated the increased popularity of prepared foods and the proliferation of food services offering prepared dishes for at-home meals available today.

The definition of “fast food establishment” was challenged in 1989 when the Commissioner of Inspectional Services (“Commissioner”) determined that the business known as “Chicken City” was in fact a fast food establishment as defined by Zoning Ordinance and not a retail food use. In response, the owners of Chicken City petitioned the Zoning Board of Appeals (ZBA) to overturn the decision of the Commissioner, which it did by vote of 5-0.

Key arguments made by the appellant hinged on the time it took to cook and prepare the foods to be sold, and that foods were used as an ingredient or component of a meal. The ZBA agreed, noting in its decision that “the product is eaten at home, the food is not available immediately and the food is not packaged for immediate consumption.” (*ZBA Petition #21-89*).

During the years subsequent to the appeal numerous types and kinds of “take out” food establishments have continued to appear in Newton. These have been permitted largely “as of right” in various Business zones as retail food establishments, which to date have not been defined in the Zoning Ordinance. For additional discussion of issues pertaining to “retail food-serving establishments,” please see the Planning Department memorandum (*RE: petition #237-01*).

B. Summary of Research

A survey of zoning regulations of nearby communities shows that Newton’s current definition of fast food establishments is in line with these other communities, and in some cases is even more explicit. The definition of “drive-in food service establishment” is also narrower than in nearby communities. For comparison of definitions utilized in neighboring communities see tables in “*ATTACHMENT A*” - *Comparison of Definitions*.

IV. ANALYSIS

A. Drive-in food service establishment definition.

The current definition in Section 30-1 establishes the “drive-in food service establishment” as a subcategory of “fast food establishment.” That is, a “drive-in” food establishment must first meet the definition of a “fast food” establishment. While the Newton and Watertown definitions specifically involve vehicular use, with transactions and consumption occurring within vehicles, the Watertown definition also includes on-premises consumption. Waltham’s definition includes

food establishments, but also contemplates other customer service drive-up window operations such as banking and dry cleaning. The Newton “drive-in food service establishment” definition is already narrow in scope as it relates only to “fast food” establishments. Since these definitions were introduced in 1974, few businesses have been addressed under this combination -- both are McDonald’s establishments. The subject petition does not offer new language or propose text modifications. However, if the intent is to capture and more closely regulate a wider spectrum of food businesses involving “take-out” type food establishments, this should be further explored. *(Also see discussion in the Planning Department memorandum pertaining to pet. #237-01 in regard to defining currently undefined “retail food-serving establishments.”)*

Should the Board seek to expand the current definition of fast food establishments (see Section I., above) and apply it to retail food businesses in Newton in an effort to control perceived concerns regarding impacts of “take-out” operations, this will affect the current use classification and zoning status of many existing retail food services. These food services could potentially be turned into non-conforming uses, as most are located in zoning districts where fast food establishments are allowed only by a special permit, or not at all. In addition, as a “drive-in food service” business is currently a subset of “fast food”, expanding the definition of “fast food” would in turn also expand the availability of “drive-in” uses to some extent for such retail food businesses as might be added to the “fast food” category. It is also noted, however, that a “drive-in” option is already currently available to retail food establishments as an accessory function and subject to special permit as discussed in Section IV.B. (following Section).

However, the Board may wish to consider whether the current definition might benefit from incorporation of additional criteria. Greater specificity may be achieved by adding language to the parent definition, i.e. to the “fast food” definition, including, but not limited to criteria such as “formula restaurant”; “percent of floor area devoted to food preparation”; “quick order instructions at counter” or similar terms utilized in other communities. The net effect would be to further narrow the definition of “drive-in food establishment” and reduce such potential uses in the BU-2 and LM zones.

B. Section pertaining to “drive-in” type businesses in BU 1-4 zones

Section 30-11(d)(10) contemplates a range of “drive-in” type businesses, stated as follows:

Drive-in or open-air business and appurtenant buildings or structures, or a drive-in business as part of any building or land used for the purposes authorized by section 30-11(a).

Subject to grant of special permit, these “drive-in” businesses may be allowed in the BU 1-4 zones either as principal businesses or as accessory to “as of right” businesses allowed under 30-11(a). The accessory language applies to any use permitted by right in section 30-11(a), including retail businesses such as food sales, printing, baking, pharmacy, or services such as dry cleaning. A partly similar arrangement is available in the Limited Manufacturing District (see Section 30-12(e)(5) and (6)).

While the general wording of the subject petition does not indicate which aspect of the above provision (Sec. 30-11(d)(10)) should be modified, it allows consideration of various approaches. Given the overall thrust of the petition regarding “drive-in” and “fast food” considerations, the potential for “drive-ins” relative to food service establishments not now covered by these definitions and use regulations suggests this as an area deserving further review. One approach might be to amplify the existing language with text specifically excluding “retail food establishments” from having “drive-in” operations. It should be noted that today we might add to

the list of take-out food establishments many food services/food retailing businesses such as coffee (along the lines of Starbucks or Peets), sushi, salad bars, bagels, burritos and wraps, soups, and supermarket prepared food counters, all of which have a presence within the City of Newton.

A relatively recent example of a request for special permit for a drive-in operation associated with a “retail food-serving establishment” is the Dunkin Donuts, located at 940 Boylston, in a Business 2 District (Pet. #523-00). The petitioner sought a special permit for the “drive-in” service not as a “fast food” establishment, but as an accessory operation pursuant to Section 30-11(d)(10) for a retail food establishment allowed in the Business 2 zone per Section 30-11(a). This petition was eventually withdrawn due to concerns pertaining to the limited size of the site, potential stacking of vehicles onto Boylston Street, and the lack of on-site parking. This example also illustrates that the Zoning Ordinance, as currently written, accomplished the policy objectives of the City of Newton in regulating a proposed “drive-in” use pursuant to the existing special permit evaluation and review process.

An amendment as noted above, would eliminate the ability of a retail food service or other retail food establishment in the BU1-4 districts to request a drive-in window, and would further limit drive-ins to just “fast food” establishments. However, other “drive-in” operations would remain available, subject to grant of special permit. Should the Board wish to consider such a limitation, the Planning Department suggests further study regarding the impact of such a change on retail food establishments in Newton.

C. Eliminate “fast food” and “drive-in food service establishments” in the Business 2 zone.

The petition seeks to eliminate “fast food establishment” and “drive-in food service establishment” from the Business 2 zone by striking the current language in Section 30-11(g)(5) which provides for such uses subject to special permit. This amendment would have the effect of restricting the subject establishments solely to the Limited Manufacturing District, which also allows such uses subject to special permit. The only properties currently zoned LM in Newton are one parcel located off Florence Street, and the office park located at Wells Avenue in the southern part of the City. The latter area is also subject to a restrictive zoning covenant, which already makes no provision for “fast food” and “drive-in”.

It is also noted that this amendment would not affect such “grandfathered” rights as may be available to fast food establishments located in various zones. In this regard, the recent Petition #164-04 of MacDonald’s located at 111 Needham St. currently zoned Mixed Use 1 (which does allow “drive-in” use) illustrates a situation where the applicant sought extension of non-conforming use pursuant to Section 30-21(b) to reconstruct the building and include a “drive-in” service. The petition was thoroughly reviewed pursuant to the special permit process and eventually withdrawn. The proposed amendment to eliminate “fast food” and “drive-in fast food service” uses from the BU-2 zone would have no bearing on this case, should the petition be resubmitted at a future date.

IV. SUMMARY AND RECOMMENDATIONS

- A. Drive-in food service establishment definition. The current definition in Section 30-1 already narrowly defines a “drive-in food service establishment” as a subset of “fast food establishment.” Both types of establishments may be located only in the Business 2 and Limited Manufacturing districts and in addition, are subject to special permit. As a result, the Planning Department sees no critical need to revise the subject definition.

However, the Board may wish to consider a change to better distinguish drive-in type fast food establishments. This may be achieved by adding language to the parent definition, i.e. to the “fast food” definition, including, but not limited to criteria such as “formula restaurant”; “percent of floor area devoted to food preparation”; “quick order instructions at counter” or similar terms. As noted above, the net effect would be to further narrow the definition of “drive-in food establishment” and reduce such potential uses in the BU-2 and LM zones.

Recommendation: *Retain current definition of “drive-in food establishment;” consider refining “fast food” definition by adding selected criteria.*

- B. Section 30-11(d)(10) pertaining to “drive-in” type businesses. This section makes available “drive-in” business uses either as principal or accessory uses, all subject to special permit. The accessory “drive-in” uses are linked to a broad range of uses allowed as of right in the BU 1-4 and LM zones, including retail food establishments. The Board may wish to consider a change to Section 30-11(d)(10) limiting the scope of accessory “drive-in” operations by removing this existing option currently available to retail food-serving establishments. In such case, the Planning Department recommends further study of the impact of such a change on retail food-serving establishments in Newton prior to adopting such a limitation. The issue of defining and regulating “retail food-serving establishments” is further discussed in the Planning Department memo regarding petition #237-01.

Recommendation: *Consider removing “drive-in” operations accessory option currently available to retail food establishments.*

- C. Eliminate “fast food” and “drive-in food service establishments” in the Business 2 zone. Striking the current language in Section 30-11(g)(5) will eliminate “fast food” and “drive-in food service establishments” in the BU-2 zone, currently available subject to special permit. Such a change would technically restrict these uses to the Limited Manufacturing District only, also subject to special permit. The only properties currently zoned LM in Newton are one parcel located off Florence St., and the office park located at Wells Avenue in the southern part of the City. The latter area is also subject to a restrictive zoning covenant, which precludes fast food and drive-in establishments. The Planning Department believes that the City already exercises sufficient control over such uses through the review and evaluation process pursuant to the special permit requirement. The net result of such a change will be overly restrictive.

Recommendation: *Deny.*

ATTACHMENTS: *Attachment A – Comparison of Definitions*

ATTACHMENT A – COMPARISON OF DEFINITIONS

Definitions of Fast Food Establishments	
Newton	An establishment whose primary business is the sale of food for consumption on or off the premises which is: (a) primarily intended for immediate consumption rather than for the use as an ingredient or component of meals (b) available upon a short waiting time; and (c) packaged and or presented in such a manner that it can be readily eaten outside the premises where it is sold.
Watertown	Any place or premises used for sale, dispensing, or serving of food, refreshments or beverages where: The primary business of the establishment is the sale of said items which are packaged or presented in Such a manner that they can be readily eaten outside the building where it is sold.
Waltham	Any establishment, except for those that are licensed to serve alcoholic beverages, where that portion of floor space designated to be used for activities related to food preparation exceeds 25% of the total floor area of that story level of the establishment used for such food preparation; or in which the total table seating provided is less than 50 seats; or that includes drive-in customer service facilities; or where the primary business of the establishment is the sale of food or drink prepared in advance of the customer's order or the preparation of quick order food upon direct instructions to personnel at a counter rather than at individual tables and which food is packaged or presented in such a manner that it can be readily consumed within the structure, upon the associated grounds, in a motor vehicle or elsewhere. For the purposes of this chapter, activities related to food preparation shall include but shall not be limited to any space used for the storage of food, for the operation of a salad bar or for serving food to customers. [Amended 5-12-1986 by Ord. No. 25929; 8-1-1994 by Ord. No. 27790; 4-24-2000 by Ord. No. 28983]
Cambridge	<p>Fast Order Food Food which is (a) primarily intended for immediate consumption rather than for use as an ingredient in or component of meals; (b) available upon a short waiting time; and (c) packaged or presented in such a manner that it can be readily eaten outside the premises where it is sold.</p> <p>Fast Order Food Establishment A specific operation separate and distinct from any other operation in the location occupied and in the kind of Fast Order Food sold, and which: V. has as its primary business the sale to the public of Fast Order Food for consumption on or off the premises, and (b) does not meet all of the following conditions: VI. provision of nondisposable plates, cups and utensils to all patrons, (2) availability of printed individual menus for all patrons, (3) provision of seventy-five (75) percent of the seating in the premises at free standing tables, rather than at counters, and (4) at least eighty (80) percent of the revenues from food sales is attributable to food consumed on premises.</p>

ATTACHMENT A – COMPARISON OF DEFINITIONS (Cont.)

Definitions of Drive-in Food Service Establishments	
Newton	A fast food establishment which provides convenient vehicular access and may provide service to customers while in their vehicles.
Watertown	Any premises used for the sale, dispensing or serving of food, refreshments, or beverages in automobiles, including those establishments where customers may serve themselves and may consume the food, refreshments or beverages on the premises, when received through a service window.
Waltham	Business establishments that are designed to allow customers to access sales or services without leaving their motor vehicles, including but not limited to automated banking facilities, drive-up dry cleaning services, drive-up food service windows or similar customer services. Further, for the purposes of this chapter, restaurants whose primary function is the provision of food for consumption off the premises shall be considered a drive-in customer service.
Cambridge	None